No. 11959

United States
Circuit Court of Appeals
For the Ninth Circuit

INDEPENDENCE LEAD MINES COMPANY,
AN ARIZONA CORPORATION, APPELLANT
v.
ALMA R. KINGSBURY AND OLGA MARQUARDT,
APPELLEES

Upon Appeal from the District Court of the United States for the District of Idaho Northern Division

APPELLEES' BRIEF

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J. K. CHEADLE,
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Attorneys for Appellees.

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STATEMENT OF THE CASE

Appellant's statement of the case (App. Br. 4-11) is controverted as being incomplete and as presenting primarily (App. Br. 4-8) matters which were adjudicated in the same case between the same parties by the 1946 judgment and decree appellant corporation now seeks to have vacated.

The basic question involved in this appeal is whether appellant corporation's amended petition (R. 50-64, 65-76) to vacate the judgment and decree fails to state a claim against appellees upon which relief could be granted. The judgment and decree, entered by the district court in the same case between the same parties on June 24, 1946 (R. 48-50), is in accordance with a stipulation of settlement between the parties (R. 45-47).

About a year after the stipulation, judgment and decree, appellant corporation filed its petition to vacate (R. 50-64). (Although entitled "motion," it has regularly been referred to as "petition.") Appellees moved to dismiss the petition on the ground that it failed to state a claim against appellees upon which relief could be granted (R. 65). Oral argument on that motion was heard on November 18, 1947, and points and authorities and briefs were submitted at the hearing (R. 77, 80). While the court had the matter under advisement, on December 6, 1947 (R. 77) appellant corporation served an amendment to its petition to vacate,

amending paragraphs VI and VII (R. 65-76). Appellees, on the same ground, moved to dismiss (R. 79), the amended petition. By stipulation (R. 77-78), the November 18, 1947 hearing was deemed a hearing on the motion to dismiss the amended petition and further briefs were filed.

The district court on February 9, 1948, having "fully considered the motions and other records and files in this cause," entered its order granting the motion to dismiss (R. 79-80). Thereafter, appellant corporation having advised the court that it desired to stand on its petition, as amended, and having declined to plead further, the court entered its order dismissing the amended petition (R. 80-82). Thereupon, this appeal was taken.

The record shows facts and circumstances of the litigation, concluded by the stipulation, judgment and decree of June 1946, which are not mentioned in appellant corporation's statement of the case (App. Br. 4-11), and which are material to consideration of this appeal.

In July 1945, about one month after appellees Kingsbury and Marquardt filed their complaint (R. 2-33) against appellant corporation, *Chas E. Horning* and F. C. Keane, as attorneys for appellant corporation, moved to dismiss the complaint (R. 34). *Chas. E. Horning,* as well as F. C. Keane, was an attorney for appellant corporation through-

out the litigation that concluded with the stipulation, judgment and decree of June 1946.

After a hearing, the court on November 30, 1945 denied the motion to dismiss appellees' complaint, and gave appellant corporation ten days in which to file its answer (R. 34-35). Appellees filed a motion for default, in April 1946, with the notice of motion addressed to appellant corporation and to F. C. Keane and Chas. E. Horning, its attorneys (R. 35). In the uncontradicted affidavit (R. 36-38) supporting the motion for default, it is stated that appellant's attorneys, Chas. E. Horning and F. C. Keane, several times requested and obtained extensions of time within which to serve and file answer, the last extension expiring January 17, 1946.

After appellees' motion for default, appellant corporation on April 29, 1946 filed its answer, subscribed by appellant corporation's attorneys *Chas. E. Horning, Eugene F. McCann* and F. C. Keane (R. 38-43).

On June 22, 1946, appellant corporation through its signatory attorneys, F. C. Keane, Eugene F. McCann and Chas. E. Horning, entered into the stipulation (R. 45-47) which compromised and settled the case.

Judge Clark's judgment and decree (R. 48) recites:

> "This cause came on to be heard upon the pleadings at Coeur d'Alene, Idaho, the 24th

> day of June, 1946, before the Court sitting without a jury, the plaintiffs being represented by their attorney, H. J. Hull, and the defendant by its attorneys, F. C. Keane, *Eugene F. McCann* and *Chas. E. Horning.* (Italics added) "Thereupon the parties filed herein their stipulation that judgment be entered herein in favor of the plaintiffs and against the defendant, and the Court having examined the pleadings, and the stipulation, and having heard and considered the evidence adduced in support thereof, and being now fully advised in the premises:
>
> "It is hereby ordered, adjudged and decreed and this does order, adjudge and decree:"

The amended petition to vacate the judgment (R. 50-64, 65-76) does not allege any fraud, lack of authority, professional neglect or unethical conduct on the part of either Chas. E. Horning or Eugene F. McCann, appellant corporation's attorneys who signed the stipulation and represented appellant corporation in connection with the judgment and decree.

The first five paragraphs of appellant corporation's amended petition to vacate the consent judgment and decree (R. 50-58) merely reallege, with elaboration, the allegations of fraud made by appellant corporation in its April 1946 answer (R. 39-40).

Further statements as to allegations contained in the amended petition to vacate are left to the Argument section of this brief. But reference again

is made to the petition itself (R. 50-64) and to the amendment to the petition (R. 65-76). It is on the petition to vacate, as amended, that appellant corporation elected to stand.

The basic question is whether the district court, having fully considered the motion to dismiss the amended petition, and the other records and files in this cause (R. 79-80), abused its discretion in dismissing appellant corporation's amended petition to vacate the judgment and decree which had been entered pursuant to appellant corporation's stipulation.

SUMMARY OF ARGUMENT

Appellees' basic contention is that appellant corporation's amended petition to vacate judgment fails to state a claim against appellees upon which relief could be granted. — The judgment now attacked is based upon and is in accordance with a stipulation of settlement to which appellant corporation is a party.

I. The amended petition's alleged fraud, which prior to judgment was alleged in appellant corporation's 1946 answer, is now res adjudicata. — It is well settled law that fraud which was in issue, or could have been dealt with, in litigation concluded by a judgment can not be made the basis of an attack on that judgment.

II. The courts uniformly hold that relief against a judgment for fraud will be granted only where the successful party practiced the fraud in the procurement of the judgment. — And appellant corporation has not cited any case holding otherwise.

III. The amended petition does not allege any fraud practiced by or on behalf of appellees in the procurement of the judgment. — Furthermore, appellant corporation's argument, that appellees participated in fraud in procuring the judgment, is unsupported by the amended petition's allegations; it is unsupported by the cases cited by appappellant; and it is contrary to established law. — The amended petition comes closer to alleging coercion of appellees than it does to alleging fraud practiced by appellees.

IV. The law favors settlement of litigation; and in the absence of fraud practiced by appellees in its procurement, the stipulated judgment will not be set aside. — F. C. Keane and other officers of appellant corporation were at least de facto officers; and in any event their authority can not be attacked collaterally in this litigation. — Moreover, appellant corporation's amended petition does not contain any allegation of fraud, lack of authority, lack of dili-

gence or unethical conduct on the part of either Chas. E. Horning or Eugene F. McCann, attorneys who (as well as F. C. Keane) represented appellant corporation in the litigation and signed the stipulation of judgment.

The district court obviously acted well within its sound legal discretion in dismissing appellant corporation's amended petition to vacate judgment.

ARGUMENT

I

The amended petition's alleged fraud, which prior to judgment was alleged in appellant corporation's 1946 answer, is now res adjudicata.

The allegations of fraud contained in the first five paragraphs of appellant corporation's petition to vacate (R. 50-58) are merely elaborated allegations of the same matters alleged in paragraph V of the corporation's answer filed April 29, 1946 (R. 39-41). It should be noted that, in paragraph VI of its amended petition to vacate (R. 69), appellant corporation expressly alleges that in its answer, prior to judgment, it did allege said fraud.

By the judgment and decree of June 24, 1946 (R. 48-50) that alleged fraud became res adjudicata.

Obviously, that alleged fraud, even if true as it is assumed to be by the motion to dismiss, could

not possibly have been fraud practiced in the procurement of the June 1946 judgment. That alleged fraud having been alleged in appellant corporation's April 1946 answer in the litigation which was settled and concluded by the June 1946 judgment now attacked, appellant corporation obviously was aware of any such alleged fraud when it effected the compromise settlement.

The leading case of *United States v. Throckmorton,* 98 U. S. 61, 68, 25 L. Ed. 93 (1878) lays down the rule that fraud which was in issue in litigation concluded by a judgment can not be made the basis of an attack on that judgment. That rule of the Throckmorton case is still in effect and is regularly applied by the Federal courts and the Idaho court.

Toledo Co. v. Computing Co., 261 U. S. 399, 421, 43 S. Ct. 458, 67 L. Ed. 719 (1923);

Brady v. Beams, 132 F. (2d) 985, 986, 987 (C. C. A. 10th 1942) cert. den. 319 U. S. 747;

Josserand v. Taylor, 159 F. (2d) 249, 251-256 (C. C. P. A. 1946);

Bradburn v. McIntosh, 159 F. (2d) 925, 932 (C. C. A. 10th 1947);

Donovan v. Miller, 12 Idaho 600, 88 Pac. 82, 84-86 (1906);

Zounich v. Anderson, 35 Idaho 792, 208 Pac. 402, 403 (1922);

Boise Payette Lumber Co. v. Idaho Gold Dredging Corp., 56 Idaho 660, 58 P. (2d) 786, 802 (1936).

In *Toledo Co. v. Computing Co.,* supra, the Supreme Court refused to permit a decree to be attacked on the ground of alleged fraud, when the court rendering the decree attacked had before it the same issue of fraud. The court found it unnecessary to consider the distinction between intrinsic and extrinsic fraud, stating:

> "We do not find ourselves obliged to enter upon a consideration of the sometimes nice distinctions made between intrinsic and extrinsic frauds in the application of the rule, because, *in any case, to justify setting aside a decree for fraud, whether extrinsic or intrinsic, it must appear that the fraud charged really prevented the party complaining from making a full and fair defense. If it does not so appear, then proof of the ultimate fact, to wit, that the decree was obtained by fraud, fails.* That is the case here." (Italics added)

In *Brady v. Beams,* supra, (in which case the Supreme Court denied certiorari) the 10th Circuit Court of Appeals held, upon the authority of the Throckmorton case, that the court will not set aside a judgment for fraud which was in issue in the suit concluded by the judgment attacked. And the court stated:

> "It is a rule of consistent observance that discovery of the alleged fraud after entry of the judgment attacked, not before, is an essential element of an action of this kind. (Citing many cases) That element is not present here and its absence is fatal."

The doctrine of res adjudicata applicable to the alleged fraud which was set forth in appellant corporation's April 1946 answer, which was disposed of by the June 1946 judgment, and which appellant corporation now alleges again in the first five paragraphs of the petition to vacate judgment, has recently been recognized and applied by the Supreme Court. In *Angel v. Bullington,* 330 U. S. 183, 192, 67 S. Ct. 657 (1947) the court held:

> "The doctrine of res adjudicata reflects the refusal of law to tolerate needless litigation. Litigation is needless if, by fair process, a controversy has once gone through the courts to conclusion. Compare, e.g. Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U. S. 238, 244, 88 L. Ed. 1250, 1255, 64 S. Ct. 997. And it has gone through, if issues that were or could have been dealt with in an earlier litigation are raised anew between the same parties."

See also: *King v. Richardson,* 54 Idaho 420, 33 P. (2d) 1070 (1934).

As for the balance of the amended petition to vacate, paragraphs VI to X (R. 58-63, 65-76), it fails to state a claim against appellees upon which relief can be granted, because it fails to allege any fraud practiced by appellees or anyone on their behalf in the procurement of the judgment.

II

Relief against a judgment for fraud will be granted only where the successful party practiced fraud in the procurement of the judgment.

The Supreme Court in *United States v. Throckmorton,* 98 U. S. 61, 65, 25 L. Ed. 31, in laying down the rule which limits relief against a judgment for fraud to those cases in which the fraud is extrinsic, also recognized that the exception to the general rule or doctrine of res adjudicata is for those cases in which the successful party practiced the fraud. As the court stated:

> "there is an admitted exception to this general rule in cases where, *by reason of something done by the successful party to a suit,* there was in fact no adversary trial or decision of the issue in the case." (Italics added)

In *Miller Rubber Co. v. Massey,* 36 F. (2d) 466, 467 (C. C. A. 7th 1930), cert. den. 281 U. S. 749, there was an attempt to enjoin collection of a judgment entered in an earlier case. The district court granted relief; but the circuit court of appeals reversed with a direction to dismiss the bill; and the Supreme Court denied certiorari. As stated in the opinion of the appellate court (36 F. (2d) 466, 467):

> "The testimony conclusively established these two facts: (a) Solely through default of their counsel, appellees failed to appear at the trial of the action and were thus prevented from offering their evidence in support of the two

defenses pleaded. (b) The default of appellees' counsel was in no way attributable to appellant or its counsel. These facts present a bald legal question, which must be answered against the contention of appellees. U. S. v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93; * * * 15 R. C. L. 756, 757.

"The two well-established maxims of the law, interest rei publicae, ut sit finis litium, and nemo debet bis vaxari pro una et eadam causa, have certain exceptions. *But the exceptions are limited to cases where the opposing party or its agent prevented a fair trial.* Where there has been no bono fide adversary trial, courts of equity are anxious to grant relief so that complete justice may be done. But their willingness so to act is limited to cases where the unsuccessful party has been prevented from presenting the full strength of its case *by reason of something done, something misleading or deceptive practiced by the successful party.* No case has been cited to us where relief was granted without a showing that the successful party participated in, or connived at, the misconduct which led the defeated party to neglect or ignore one or more of its defenses." (Italics added)

See also: *Van Gilder v. Warfield's Unknown Heirs and Devises,* 63 Idaho 328, 120 P. (2d) 243, 245 (1941).

The well established law on this point is reflected in the *Restatement of the Law of Judgments*:

Sec. 122 (p. 593)

"Subject to general equitable considerations (see Secs. 127-130), equitable relief from a valid judgment will be granted to a party to

the action injured thereby if in the action he was prevented from having a fair trial because of the bribery of or duress upon his attorney, agent or other person in charge of the action or defense, *by the other party to the action.*" (Italics added)

Comment (p. 596)

"e. *Collusion or duress.* There is collusion where a party to an action or someone acting on his account induces a fiduciary to neglect, or to act contrary to, the interests of the beneficiary. This may be accomplished by a money payment or promise of future benefits to the fiduciary, or by causing him to act out of friendship or by persuasion. *Mere knowledge that the fiduciary is neglecting the interests of the beneficiary does not constitute collusion; there must be some cooperation or activity in causing him to act wrongfully.*" (Italics added)

Appellant corporation has not cited a single case that holds otherwise than the controlling authorities referred to above. Regarding relief against a judgment for fraud, appellant's brief cites only the cases discussed in the following paragraphs:

In *Hanna v. Brictson Mfg. Co.,* 62 F. (2d) 139, 148 (C. C. A. 8th 1933), (App. Br. 19), the defendants were the successful parties, in an earlier suit, and others for whom the successful parties had acted. The defendants fraudulently had managed to keep notice of the earlier suit from reaching the defendant company. The court held in the later action to vacate that the successful parties

in the earlier suit by their fraud had imposed on the court and had prevented the company from making a full and fair defense.

Likewise, in *Whitney v. Hazzard,* 18 S. D. 490, 101 N. W. 346 (1904), (App. Br. 26-28), the successful party in the earlier action had obtained the decree by his fraud and by his collusion with the president of the unsuccessful corporation.

Likewise, in *Manahan v. Petroleum Producing & Refining Company,* 198 App. Div. 192, 189 N. Y. S. 127 (1921), (App. Br. 28), the court vacated the judgment attacked because it had been procured by a fraud knowingly perpetrated by the plaintiff and the president of the defendant corporation.

In the case of *In Re Interborough Consolidated Corporation,* 288 Fed. 334 (C. C. A. 2nd 1923), (App. Br. 30), the court did state the same rule quoted from Corpus Juris on page 30 of appellant corporation's brief. But in that case the court held said rule to be inapplicable, because those seeking to invoke the rule were creditor-bondholders and not stockholders. In any event, said rule is applicable to contests between stockholders having rights in a dividend fund and other creditors, and has no bearing on the question involved in this appeal.

In *Wecker v. National Enameling & S. Co.,* 204 U. S. 176, 185, 27 S. Ct. 184, 51 L. Ed. 430 (1907),

(App. Br. 31), the plaintiff sued a foreign corporation in a Missouri state court and joined a Missouri individual as defendant, for the purpose of defeating the corporation's right to remove the case to the federal court. Plaintiff alleged that the individual was a supervisory employee of the corporation, but the individual defendant was shown in fact not to be such. Plaintiff had knowledge of the fact or was in a position to ascertain the fact, since plaintiff was an employee of the corporation. If there was any fraud in that case, it was fraud practiced by the plaintiff—so to speak, fraud in attempted procurement of exclusive state court jurisdiction. Obviously, neither the facts nor the law involved in that case are pertinent to this appeal.

In *Pacific R. R. Co. of Mo. v. Mo. Pac. R. R. Co.,* 111 U. S. 505, 4 S. Ct. 583, 28 L. Ed. 498 (1884), (App. Br. 32), the court, on demurrers, upheld an attempt by the mortgagors to vacate a decree of foreclosure entered in an earlier suit. As the court's opinion points out, many of the plaintiffs and defendants in the foreclosure suit conspired and acted together fraudulently, both in setting up fictitious and unlawful mortgage debts and in the conduct of the foreclosure suit. The attorney for the mortgagor railroad, one Mr. Baker, had fraudulent association with the parties who were plaintiffs in the foreclosure suit and defendants in the proceeding for relief against the decree. Mr. Baker prepared the complaint for foreclosure; he had it served

on himself; he then put in an answer admitting false allegations; he gave instructions to the solicitors for the plaintiffs in the foreclosure suit and they acted in accordance with his instructions; and finally Mr. Baker bought in the property at the foreclosure sale. — That case obviously was one in which the successful parties and their attorneys actively participated in the fraud which prevented a fair trial.

Examination of the cases cited by appellant corporation shows that it is accurate to state in connection with this appeal, as the court stated in *Miller Rubber Co. v. Massey,* 36 F. (2d) 466, 467 (C. C. A. 7th 1930), cert. den. 281 U. S. 479 (p. 12 supra):

> "No case has been cited to us where relief was granted without a showing that the successful party participated in, or connived at, the misconduct which led the defeated party to neglect or ignore one or more of its defenses."

III

The amended petition does not allege any fraud practiced by or on behalf of appellees in the procurement of the judgment. —

Furthermore, appellant corporation's argument, that appellees participated in fraud in procuring the judgment, is unsupported by the amended petition's allegations; it is unsupported by

the cases cited by appellant; and it is contrary to established law. —

The amended petition comes closer to alleging coercion of appellees than it does to alleging fraud practiced by appellees.

Appellant corporation in its argument contends that: "The amended petition alleges participation by appellees in fraud in the procurement of the stipulated judgment" (App. Br. 18). But neither the allegations in the amended petition nor the cases cited by appellant support that contention. Moreover, the very allegations themselves rebut appellant corporation's "factual" argument.

Much of appellant's "factual" and legal argument (App. Br. 20-31) is to the effect that appellees owed fiduciary duties to the corporation and its other common stockholders—although the amended petition itself contains allegations that appellees were stockholders of merely 25% of the stock in the corporation, and that appellant corporation had discriminated against appellees' stock in declaring the Clayton dividend and had questioned the validity of the stock held by appellees. In its strained and strange argument, appellant corporation contends that (App. Br. 21):

> "The situation presented here is a course of dealing between the appellant corporation and the appellees where the appellees because of their relationship to the corporation had actual

> knowledge of the corporation's affairs, and also had, because of their large stock ownership and active interest and dealings with the appellant, an actual domination of the corporation."

However, the "course of dealing" as shown by the very allegations of the amended petition was one in which appellant corporation not merely had put appellees at arms length, but also had discriminated against appellees' stock in the declaration of the Clayton dividend and also had questioned the validity of appellees' stock. The amended paragraph VI of the petition (R. 67-68) contains an allegation of a portion of the minutes of the meeting at which the Clayton dividend was declared; and said allegation shows the discrimination against appellees' Class A common stock and shows that appellant corporation questioned the validity of said stock. — It was to assert their right to participate in the declared dividend made up of Clayton stock that appellees brought suit against appellant corporation.

A stockholder's right of action against the corporation to recover a dividend after it has been declared is a right of action held by the stockholder in his individual capacity. *Fletcher Cyclopedia Corporations* (Perm. Ed.) vol. 13, p. 282, sec. 5922. And after declaration of the dividend, all community of interest in relation to the dividend, as between the stockholders and the corporation is at

an end. Moreover, the action to recover the dividend "may be maintained, not only by stockholders who have been recognized by the corporation as entitled to share in the dividend, but also by those who have been wrongfully denied the right to share therein, * * *" *Fletcher Cyclopedia Corporations* (Perm. Ed.) vol. 11, pp. 908-910, sec. 5365.

Thus, all community of interest between appellees and appellant corporation, in relation to the Clayton stock, was at an end. Appellees, in their individual capacities, were asserting against appellant corporation their right of action to recover the dividend of Clayton stock.

Furthermore, the situation was clearly one in which, in accordance with well settled rules, there cannot be imputed to appellees knowledge of what went on within the appellant corporation.

"A stockholder is not bound to the strict rule as to knowledge of the affairs of a corporation that applies to directors and officers." *Fletcher Cyclopedia Corporations* (Perm. Ed.) vol. 13, p. 27, sec. 5711.

Stockholders of a corporation are not its agents simply because of their status as stockholders. Therefore, as stated in *Fletcher Cyclopedia Corporations* (Perm. Ed.) vol. 1, p. 131, sec. 39:

> "The declarations and admissions made by stockholders or members are not those of the corporation, and are not admissible as evidence against it. *For like reasons the acts of the cor-*

poration are not the basis of an estoppel in pais against the members, and the converse would also be true.

* * * *

"Equities, such as unclean hands, cannot be imputed to the stockholders of the corporation from the other's conduct, if there was equity in the party to the suit." (Italics added)

In vol. 3, p. 96, sec. 814 of *Fletcher Cyclopedia Corporations* (Perm. Ed.), it is stated that since the stockholders of a corporation, individually, are not its agents, the rule is well settled that notice to individual stockholders who are not also officers of the corporation, or knowledge of facts possessed by such stockholders, is not notice to the corporation. For the same reasons, the converse follows—knowledge of what goes on within the corporation is not imputed to individual stockholders who are not officers or directors of the corporation.

Referring again to the alleged minutes in the amended paragraph VI (R. 67) and to Fletcher's work on corporations: "all community of interest in relation to such [Clayton] dividend, as between the stockholders themselves and between the [appellees] stockholders and the [appellant] corporation is at an end." *Fletcher Cyclopedia Corporations* (Perm. Ed.) vol. 11, pp. 908-910, sec 5365.

Surely appellees' pressing their right of action to recover the dividend, that right being held by them in their individual capacities, and their press-

ing that right by way of litigation, placed appellees and appellant corporation at arms length as regards the subject matter of the litigation.

In contending otherwise, appellant corporation disregards the well settled law as to a stockholder's right of action against a corporation to recover a dividend after it has been declared.

Moreover, appellant corporation in its contention that appellees had actual domination of the corporation by reason of their stockholding, makes in its brief statements or assumptions of fact which are contrary to allegations in the amended petition. Appellant corporation, by such contention, also plays both ends against the middle with inconsistent arguments.

As is shown in the stipulation and judgment and decree (R. 45-50), appellees held 1,000,000 shares of Class A common stock. And as alleged in paragraph V of the petition to vacate (R. 57) said 1,000,000 shares of Class A common stock held by appellees was only 25% of the 4,000,000 shares of stock in appellant corporation. At the conclusion of said paragraph V of the petition to vacate (R. 58), appellant corporation alleges that the 1,000,000 shares of Class A common stock is a fraudulent issue and should be set aside and returned to the company for cancellation.

Thus, the amended petition shows that appellant

corporation seeks to base the so-called "control" or "domination", which appellant corporation now contends the appellees had, principally upon the million shares of Class A stock, the validity of which appellant corporation questioned in August of 1944 and denied in its answer of April 1946 and the validity of which, notwithstanding the judgment of June 1946, appellant corporation now seeks to have relitigated. — Appellant corporation, nevertheless and inconsistently, now assumes that said stock was valid, for the purpose of appellant corporation's inferential contention that appellees were under a duty to abandon their claim that dividend rights went with said stock, and to use the so-called "control" which said stock gave them to attempt to clean up the internal mismanagement of the appellant corporation which was denying the validity of said stock and the dividend rights that went with it.

Instead of "control", appellees had only 25% of the stock in appellant corporation, and appellant corporation was denying the validity of that stock. Its validity was recognized by appellant corporation in the stipulation for the judgment and decree of June 24, 1946 (R. 45-50); and now appellant corporation seeks to relitigate its validity.

Furthermore, and aside from the so-called "control" which appellant contends appellees had, appellant corporation has not cited any authority

which supports its contention that it was incumbent on appellees to abandon their cause of action against appellant corporation and to devote themselves, as stockholders, to improving the internal management of appellant corporation.

In *Dodge v. Scripps,* 179 Wash. 308, 37 P. (2d) 896, 900 (1934), (App. Br. 22, 23), the defendant Scripps not only controlled his family's holdings of 70% of the stock, he was also treasurer of the corporation and chairman of the board. But the court refused to enjoin the major stockholder-officer from selling plaintiff's stock which was pledged to the corporation. That case does not support appellant corporation's contention.

In re Los Angeles Lumber Products Co., 46 F. Supp. 77, 81 (D. C., S. D. Calif. 1941), (App. Br. 22) involved a breach of fiduciary duties owed by a Mr. Faries who was a vice-president, a director and the attorney for the corporation. That case might support an action by appellant corporation against F. C. Keane, but it does not support appellant corporation's contention that fiduciary duties were owed by appellees who were merely stockholders asserting their claim to a dividend.

Morse v. Metropolitan S.S. Co., 87 N. J. Eq. 217, 100 At. 219, 221 (1917), (App. Br. 23), involved primarily the question whether appointment of a receiver would disrupt the corporation's business; inferentially it appeared that the corporate direc-

tors were "dummies" controlled by and taking instructions from one Mr. Robbins. That case might be relevant in an action against F. C. Keane; but it is no authority for appellant's attack against the judgment and decree in this case on appeal.

In re Kansas City Journal-Post Co., 51 F. Supp. 1009, 1014, 1015 (D. C., W. D. Mo. 1943), (App. Br. 23), involved a dominant stockholder, one Mr. Schapiro who had bought all of the stock and bonds of the corporation. But the case was decided, in his favor, on the point that he had no fiduciary obligation at the time of his purchase. That case clearly has no bearing on this appeal.

Heimbaugh v. Hitchcock, 115 Kan. 182, 222 Pac. 114 (1924), (App. Br. 23), was an action against a stockholder who owned all of the preferred and 92% of the common stock and who controlled an additional 6% of the common. His wrongful action was in effecting a modification of the corporation's charter, cancelling the preferred stock and having common issued to take its place. For appellant corporation's purpose, there is no similarity between that case and the situation of appellees, owners of 25% of the stock, asserting in their individual capacities their right to a dividend against appellant corporation which denied their right to the dividend and questioned the validity of their stock.

Appellant corporation in citing *Levy v. American*

Beverage Corp., 265 App. Div. 208, 38 N. Y. S. (2d) 517, 524, 525 (1942), (App. Br. 22), presents an authority which is definitely contrary to appellant's contention. The New York court, in refusing to hold that a majority stockholder, as such, was a fiduciary for other stockholders, stated:

> "Stockholders are not ipso facto trustees for one another. * * *
>
> "A majority stockholder does not become a fiduciary for other stockholders by reason merely of ownership of his stock. It is only where he steps out of his role as a stockholder, and acts in the management and conduct of the corporation, with disregard of the interests of the corporation and of the minority stockholders that he is said actually to become a fiduciary instead of a mere stockholder."

The cases appellant cites either fail to support appellant's argument or rebut it. — And the allegations in the amended petition not only fall short of alleging any fraud on the part of appellees; some of the allegations, assuming them to be true, come closer to alleging coercion of appellees than to alleging fraud practiced by appellees.

The second sub-paragraph of the petition's amended paragraph VII (R. 71-72) is all alleged on information and belief. It is a strain on credulity to assume that *anyone* with a claim against a corporation, whether the claim were disputed or recognized by the corporation, — "(well knowing that the same [corporation] was being bankrupted by

the so-called president of the Company)" (R. 72) would sit back and not attempt to stop the bankrupting "for the reason" (R. 72) that the claimant could more easily settle with the defalcating bankrupter. — But admitting for the purpose of the motion to dismiss such facts as are well pleaded on information and belief, there is still no allegation in paragraph VII (or elsewhere in the amended petition) that shows fraud or connivance practiced by appellees or their attorney or anyone acting for them. The alleged information which it is alleged appellees received shows the contrary. The alleged information received by appellees through their own business connections, according to the second sub-paragraph of VII, and from one John Sekulic, according to a later sub-paragraph, would have amounted to information and threats which caused appellees to compromise and settle on terms proposed on behalf of appellant corporation.

Admitting, as the motion to dismiss must, the allegations of fact in the third sub-paragraph of amended VII (R. 72), the alleged notice given to the Clayton company in July 1945 was consistent with appellees' pressing their claim and their lawsuit (commenced in June 1945) against appellant corporation. Said alleged notice to the Clayton company was just the opposite of connivance by appellees or their attorney with F. C. Keane.

The fourth sub-paragraph of amended VII (R. 73) alleges, upon information and belief, substan-

tially the same matters as the second sub-paragraph, more general in some respects, more detailed in others.

The fifth sub-paragraph of amended VII (R. 73-75) alleges that one John Sekulic acted as agent for President F. C. Keane in arranging the compromise and settlement with appellees. It alleges that Sekulic, instructed and subsequently paid by Keane, "informed" appellees that if they did not accept the settlement proposed by him, then they would receive no Clayton stock at all, because Keane would sell or dispose of all that was left and put the funds to his own use. Admitting the facts well pleaded, the fifth sub-paragraph alleges in effect that Sekulic put up to appellees the terms of the compromise and settlement on a "this-or-nothing" basis, and that appellees accepted. These are allegations that Keane, through Sekulic, used Keane's alleged defalcations and a threat of further defalcations to persuade appellees to accept the terms of the compromise and settlement. — This does not allege connivance by appellees. It comes closer to alleging coercion of appellees.

The sixth sub-paragraph of amended VII (R. 75) alleges that appellees had information of appellant corporation's affairs by reason of Sekulic's alleged activities.

The seventh and last sub-paragraph of amended VII (R. 75-76) contains allegations, entirely unre-

lated to appellees, that likewise show no connivance or fraud practiced by appellees in procuring the judgment and decree of June 24, 1946.

On page 30 of its brief, appellant corporation refers to the fact that the compromise settlement and consent judgment resulted in appellees taking a reduction of 80,000 shares of the Clayton stock which they claimed and surrendering 400,000 shares of the Class A common stock which they held. Then appellant corporation, by way of rhetorical inquiries and conclusion (App. Br. 30-33), suggests that those provisions of the settlement which were favorable to appellant corporation should be the basis of an inference that the consent judgment was a fraud on appellant corporation and the court. Thus, appellant corporation having in the middle of its brief (pp. 24-25) inferred that appellees should be charged with fraud for not dropping their cause of action against appellant corporation and attempting to correct the alleged internal misconduct, proceeds a few pages later to infer that there was fraud practiced by appellees because they did not press their cause of action to its full extent. — And when the clutter of these confused and inconsistent arguments is left, for a view of the allegations in the amended petition, appellant corporation is found in paragraph VII (R. 73-74) to have alleged that, acting for President Keane, one John Sekulic put the terms of the compromise settlement to appelleees on a "this-or-nothing" basis,

backed by the alleged threat that if appellees did not accept, then Keane would misappropriate to his own use all remaining Clayton stock.

IV

The law favors settlement of litigation; and in the absence of fraud practiced by appellees in its procurement, the stipulated judgment will not be set aside. —

F. C. Keane and other officers of appellant corporation were at least de facto officers; and in any event their authority cannot be attacked collaterally in this litigation. —

Moreover, appellant corporation's amended petition does not contain any allegation of fraud, lack of authority, lack of diligence or unethical conduct on the part of either Chas. E. Horning or Eugene F. McCann, attorneys who (as well as F. C. Keane) represented appellant corporation in the litigation and signed the stipulation of judgment.

The record shows that the judgment now attacked is not for the full relief sought by appellees, but is based upon and pursuant to a compromise settlement entered into by appellees and appellant corporation (R. 2-33; 45-50).

The law favors the settlement of litigation and the compromise of disputed claims. *Clark v. Barlow,* 122 F. (2d) 337, 341 (App. D. C. 1941), cert. den. 314 U. S. 675. And, as the Supreme Court held in *Thompson v. Maxwell,* 95 U. S. 391, 397, 398, 24 L. Ed. 481 (1877), a bill of review will not lie where the decree was pursuant to a compromise settlement, in the absence of fraud in obtaining it. Regarding that rule, the court of appeals stated in *Walling v. Miller,* 138 F. (2d) 629, 631 (C. C. A. 8th 1943), cert. den. 321 U. S. 784:

> "One reason for the rule is obvious. A court which, having jurisdiction of the parties and of the subject matter, renders a consent decree, if it sustains a motion of one of the parties to vacate such decree, not only sanctions the breach of a contract but in effect becomes a party to the breach."

Appellant corporation's attack on the consent judgment is based in part on a contention and on allegations (mostly conclusions of law) that President F. C. Keane and other officers of appellant corporation acted as such without legal right or authority.

In the first sub-paragraph of paragraph VI of the amended petition (R. 66) appellant corporation collaterally attacks the authority of F. C. Keane and others who were president, officers and directors of the corporation in June 1946 and prior years. But in the first and subsequent sub-para-

graphs of paragraph VI, in paragraph VII (R. 70) and in the third sub-paragraph of paragraph X (R. 63) of the petition, as amended, appellant corporation alleges facts which clearly show that, from the commencement of this litigation to its compromise and settlement in June 1946, F. C. Keane was at least the de facto president of appellant corporation, and the other officers and directors of appellant corporation were at least de facto officers and directors, and that they were recognized as such by appellant corporation and its stockholders.

It is well settled law that F. C. Keane and the other persons acting as officers and directors of the defendant corporation at the time of the settlement of this action were at least de facto officers and directors, and that as such they had authority to represent the corporation with binding effect. Decided cases also make it clear that the authority of those officers can not be attacked collaterally in this litigation. — *Copper Belle Mining Co. v. Costello,* 12 Ariz. 318, 100 Pac. 807, 810 (Ariz. 1909) — (directors of West Virginia corporation held to be de facto directors, even though not residents of West Virginia, as required by West Virginia statute); *Guaranty Loan Co. v. Fontanel,* 183 Cal. 1, 190 Pac. 177, 180 (Calif. 1920) — (those exercising duties of corporate offices held de facto officers; and their lack of authority could not be questioned collaterally); *Consumer's Salt Co. v.*

Riggins, 208 Cal. 537, 282 Pac. 954, 955 (Calif. 1929) and *Farbstein v. Pacific Oil Tool Co.,* 127 Cal. A. 157, 15 P. (2d) 766, 769 (Calif. 1932) — (validity of election of corporate directors could not be questioned by corporate creditors, by the corporation, by stockholders of the corporation or by the directors themselves, in actions involving assessments on the corporate stock); *American Concrete Units Co. v. National Stone-Tile Corp.,* 115 Cal. A. 501, 1 P. (2d) 1084 (Calif. 1931) — (pending litigation re removal, removed officers continued to exercise duties of offices; and court held that, even after their removal, they were de facto officers and that their acts bound the corporation); *McKeehan v. Pacific Finance Corporation,* 120 Cal. A. 578, 8 P. (2d) 213, 215 (Calif. 1932) — (held that even though defendant lacked statutory qualification of being a stockholder he could be and was a de facto director).

It should be noted that in paragraph VI of its petition, as amended (R. 66-70), appellant corporation recognizes in part the validity of the dividend of Clayton stock which was declared by appellant corporation in September 1944, when its officers were F. C. Keane and others whose authority the appellant corporation now seeks to question in part.

It is elementary that appellant corporation is a corporate entity of continuing existence, and that

it can not repudiate its agreements or stipulations or other obligations upon a change of management.

As pointed out in *Fletcher Cyclopedia Corporations* (Perm. Ed.) Vol. 9, Sec. 4705, p. 578: "A default judgment is equally a bar with one rendered on a contest by the corporation, and includes all the facts confessed by the default." Even more is the appellant corporation barred in this case where the judgment was not merely a default judgment, but was one effecting a compromise and settlement to which the appellant corporation stipulated.

Appellant corporation's allegations that F. C. Keane abused his corporate office furnish no basis for disregarding the above quoted rule. As stated in *Fletcher Cyclopedia Corporations* (Perm. Ed.) Vol. 9, Sec. 4703, p. 574, with regard to vacating or setting aside of judgments against a corporation: "Neglect or delinquency of its own officers generally precludes relief, *except where fraud of the officer in connection with plaintiff is involved.*" (Italics added) The alleged misconduct of Keane might support an action by appellant corporation against Keane. But such allegations, especially when they include allegations that Keane, through Sekulic, used his misconduct and threats of further misconduct to induce appellees to accept a compromise settlement favorable to appellant corporation as well as to appellees, furnish no basis for relief against appellees. Nor do such allega-

tions go to Keane's authority as, at least, de facto president of the corporation.

Nahtel Corp. v. West Virginia Pulp & Paper Co., 141 F. (2d) 1, 3 (C. C. A. 2nd 1944), and *Arizona Southwest Bank v. Odam,* 38 Ariz. 394, 300 Pac. 195, 197 (Ariz. 1931) are to the effect that appellant corporation is estopped from litigating again the issues settled by the stipulated judgment, and is estopped from denying the authority of its former officers.

The second sub-paragraph of the amended paragraph VI (R. 66-67) merely adds allegations that appellant corporation on November 29, 1947, obtained certain affidavits from Messrs. Mullen and Evans. The contents of the affidavits are not alleged as facts, but even if they were, such allegations would not alter the situation. The amended petition would still contain the allegations that show de facto officers and estoppel of appellant corporation from denying their authority. — Of course, the allegations of conclusions of law, e.g., that Keane and the other officers "had no right or authority to act as such directors or officers" (R. 66), are not admitted by the motion to dismiss. *Green v. Brophy,* 110 F. (2d) 539, 544 (App. D. C. 1940); *Dixie Margarine Co. v. Schaefer,* 139 F. (2d) 221, 224 (C. C. A. 6th 1943).

The balance of the petition's amended paragraph VI (R. 67-70) shows that in the compromise settlement appellees received only 68% of the Clayton dividend for which they sued; that there was enough Clayton stock held by appellant corporation, at the time the dividend was declared, to pay all stockholders, including the appellees, on the declared basis of one share of Clayton to four of Independence; and that the 32% reduction in the Clayton dividend which appellees were persuaded to take in the settlement was a greater reduction than that allegedly suffered by the other common stockholders. Also, paragraph VI (R. 69) shows by implication, as this Court's judgment and decree specifically provides (R. 49), that in the compromise and settlement appellees suffered judgment that they surrender to appellant corporation 400,000 shares of the 1,000,000 shares of Class A common stock held by appellees.

In paragraph VIII of the petition, as amended (R. 61), it is alleged that Chas. E. Horning, acting as one of the attorneys for appellant corporation, was paid and received the sum of $10,000.00 from appellant corporation for his services in the litigation which was concluded by the June 1946 judgment and decree. — It is very significant that nowhere in the original petition (R. 50-64) or the amendment to the petition (R. 65-76) does appellant corporation make any allegation of fraud, lack of authority, lack of diligence or unethical con-

duct on the part of either Chas. E. Horning or Eugene F. McCann who (as well as F. C. Keane) subscribed appellant corporation's April 1946 answer (R. 43), acted and signed for appellant corporation in the stipulation of settlement (R.47), and appeared before Judge Clark in connection with the judgment and decree (R. 48).

The amended petition does not and cannot remove the signatures of Chas. E. Horning and Eugene F. McCann from the stipulation of settlement of this case, dated June 22, 1946, and filed herein (R. 47). As shown by the record, those two attorneys as well as F. C. Keane were attorneys for appellant corporation from the time its answer was filed in April 1946. Their appearance in the litigation and their signatures on the stipulation pursuant to which this Court entered its judgment and decree on June 24, 1946, are at least a prima facie court record of their authority and of the good faith exercise of their professional judgment on behalf of appellant corporation. *Bowles v. American Brewery,* 146 F. (2d) 842, 847 (C. C. A. 4th 1945); *Liken v. Shaffer,* 64 F. Supp. 432, 449 (D. C., N. D. Iowa 1946). Neither in the original petition (R. 50-64) nor in the amendments to paragraphs VI and VII (R. 65-76) is there any allegation which attacks that prima facie court record.

A case that bears directly on the situation involved in this appeal is *Piccard v. Sperry Corpora-*

tion, 48 F. Supp, 465, 467, 469 (D. C., S. D. N. Y. 1943); aff'd., per curiam, 152 F. (2d) 462; cert. den. 328 U. S. 845. In that case the district court held that the corporation had "obtained a settlement which, in view of the difficult issue of fact and the uncertainty attending all litigation, is fair." It is particularly significant that in that case the claim of the corporation against one of its directors was for an amount of $193,000; that the corporation settled that claim with the director for $101,407.05; and that the District Court in the subsequent stockholders' derivative action against the other directors held that the $193,000 claim was a good one. Nevertheless, the Court held further that the claim was uncertain when settled; that the directors acted in good faith; and that their business judgment exercised on behalf of the corporation at the time of the settlement was not subject to attack.

Moreover, the court in that case held that one of the defendant directors was not disqualified from voting on the settlement because he expected compensation in attorney's fees for negotiating the settlement.

The court there also held that a director was not disqualified from voting on the settlement because he was a stockholder in the other, adverse corporation—nor was he disqualified because his wife was a stockholder in the adverse corporation.

And the district court's decision in *Piccard v. Sperry Corp.,* 48 F. Supp. 465, was affirmed per curiam by the Circuit Court of Appeals, 152 F. (2d) 462, and the Supreme Court of the United States denied a petition for writ of certiorari, 328 U. S. 845.

In view of the holding in *Piccard v. Sperry Corp.,* and in view of appellant corporation's not raising any question as to the authority, integrity or professional judgment exercised in the compromise and settlement by appellant's attorney Chas. E. Horning and Eugene F. McCann, it is clear that the amended petition fails to allege a basis for vacating the judgment.

A petition to open, vacate or set aside a judgment is addressed to the sound legal discretion of the district court, and its determination of the matter is not disturbed on appeal except for a clear abuse of discretion. *Western Union Telegraph Co. v. Dismang,* 106 F. (2d) 362, 364 (C. C. A. 10th 1939); *Bush v. Bush,* 61 App. D. C. 357, 63 F. (2d) 134 (1933); *In re Rochester Sanitarium & Baths Co.,* 222 Fed. 22, 26 (C. C. A. 2nd 1915). — There was no abuse of discretion in the district court's dismissal of appellant corporation's amended petition, which does not allege any fraud practiced by appellees in procurement of the judgment, and which does not question the authority, good faith or diligence of attorneys Chas E. Horning and Eugene F. McCann who represented appellant corporation and stipulated the compromise settlement.

CONCLUSION

Appellant corporation can not avoid the controlling authorities which hold that the alleged fraud, set forth in appellant corporation's April 1946 answer, was made res adjudicata by the June 1946 stipulation and judgment.

Appellant corporation can not avoid the controlling authorities which hold that relief against a judgment for fraud will be granted only where the successful party practiced fraud in the procurement of the judgment.

Appellant corporation's amendment petition does not contain any allegation of fraud practiced by appellees, their attorney or anyone acting for appellees. — The amended petition's allegations of knowledge by appellees of F. C. Keane's misconduct do not constitute collusion or participation by appellees in such misconduct; and appellant corporation has not cited any authority which supports its contrary contention. — The amended petition does contain allegations which show that all community of interest, regarding the Clayton stock, between appellees and appellant corporation ended when appellant corporation declared the Clayton dividend and took a position antagonistic to appellees' interest in the dividend and antagonistic to the validity of appellees' Class A common stock

in appellant corporation. — Moreover, the amended petition alleges, regarding internal affairs of appellant corporation, that appellees received information and threats calculated to induce them to accept the compromise settlement which allegedly was proposed to appellees by one John Sekulic on a "this-or-nothing" basis. Thus, the amended petition comes closer to alleging coercion of appellees than it does to alleging fraud or connivance practiced by or on behalf of appellees.

The amended petition alleges facts which show that F. C. Keane and other officers of appellant corporation were at least de facto officers at the time of the compromise settlement; and in any event, the authority of those officers can not be attacked collaterally in this litigation.

Significantly, the amended petition does not question the authority, good faith or diligence of attorneys Chas. E. Horning and Eugene F. McCann who (as well as F. C. Keane) acted for appellant corporation in effecting the compromise settlement. And, settlement of litigation is favored by the courts.

In view of what appears in the record upon appeal and in view of the argument and the controlling authorities presented in this brief, it is manifest that the district court's order dismissing the amended petition should be affirmed.

Respectfully submitted,

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